

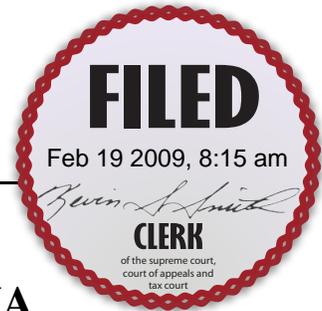
**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**

APPELLANT PRO SE:

**MICHAEL T. LEWIS**  
Columbus, Indiana

ATTORNEY FOR APPELLEE:

**DAVID A. NOWAK**  
Columbus, Indiana



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL T. LEWIS, )  
 )  
Appellant-Respondent, )  
 )  
vs. ) No. 03A05-0809-CV-558  
 )  
NICOLE (LEWIS) SPARKS, )  
 )  
Appellee-Petitioner. )

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APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT  
The Honorable Jon W. Webster, Special Judge  
Cause No. 03D02-0601-DR-3

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**February 19, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Michael T. Lewis (“Father”) appeals a custody modification and child support order regarding his two children with Nicole Lewis Sparks (“Mother”). We affirm in part, reverse in part, and remand.

## **Issue**

Father presents a single, consolidated issue for review: whether the findings of fact, conclusions of law, and judgment are clearly erroneous.

## **Facts and Procedural History**

Mother and Father were divorced on December 9, 2003, and Father was awarded the physical custody of their two children, J.L. (born May 4, 1996) and S.L. (born February 2, 2001) (“the Children”). In late 2005, Mother petitioned to modify the custody of J.L. and S.L. Her petition was denied on June 16, 2006.

On July 31, 2007, Mother filed a petition to modify custody and requested a custody evaluation and change of judge. The motions for a custody evaluation and change of judge were granted. On August 29, 2008, a hearing was conducted on the petition to modify. On September 2, 2008, the trial court entered its findings of fact, conclusions of law, and order. The trial court awarded the physical custody of J.L. and S.L. to Mother, found Father to be voluntarily unemployed, and ordered Father to pay child support of \$217.00 weekly. This appeal ensued.

## Discussion and Decision

### I. Standard of Review

Child custody determinations are within the discretion of the trial court and will not be disturbed except for an abuse of discretion. Truelove v. Truelove, 855 N.E.2d 311, 313 (Ind. Ct. App. 2006). We will not reverse unless the trial court's decision is against the logic and effect of the facts and circumstances before it or the reasonable inferences drawn therefrom. Id. Likewise, the determination of child support obligations is within the discretion of the trial court. Liddy v. Liddy, 881 N.E.2d 62, 69 (Ind. Ct. App. 2008), trans. denied.

Additionally, Father is appealing from a decision in which the trial court entered special findings of fact and conclusions pursuant to his request. Indiana Trial Rule 52(A) prohibits a reviewing court from setting aside the trial court's judgment "unless clearly erroneous." In re Marriage of Nickels, 834 N.E. 2d 1091, 1095 (Ind. Ct. App. 2005). When reviewing the trial court's findings of fact and conclusions thereon, we consider whether the evidence supports the findings and whether the findings support the judgment. Bettencourt v. Ford, 822 N.E.2d 989, 997 (Ind. Ct. App. 2005) (citing Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997)). Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. In order to determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made. Id.

## II. Analysis

Pursuant to Indiana Code Section 31-17-2-21, a court may not modify a child custody order unless the modification is in the best interests of the children and there is a substantial change in one or more of the factors set forth in Indiana Code Section 31-17-2-8. Those factors are:

- (1) The age and sex of the child.
- (2) The wishes of the child's parent or parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
  - (A) the child's parent or parents;
  - (B) the child's sibling; and
  - (C) any other person who may significantly affect the child's best interests.
- (5) The child's adjustment to the child's:
  - (A) home;
  - (B) school; and
  - (C) community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Here, Mother alleged that Father's stability had decreased since their divorce and prior custody modification hearing, while her stability had increased. Mother had remarried,

purchased a home in the country, completed EMT training, and given birth to another child. She was, as of the custody hearing, a stay-at-home mother expecting her fourth child. Father had lost his most recent position as an engineer, had moved in with the Children's grandmother, and was supporting himself and the Children with unemployment insurance and food stamps.

The custody evaluator observed that J.L. expressed a clear preference for living with Mother while S.L. was primarily concerned about maintaining contact with her paternal grandmother. Also, the custody evaluator found that Mother's living situation had become "increasingly stabilized" while Father's "unstable employment history and living arrangements over the last three years have contributed, to some degree, to adjustment difficulties for his son and daughter in their home environment with lessening involvement in outside activities due to a lack of finances." (Evaluation Exhibit, pgs. 3-4). The evaluator also noted "some decline in Mr. Lewis' overall emotional functioning[.]" (Evaluation Exhibit, pg. 4).

In changing physical custody of the Children to Mother, the trial court emphasized Father's unemployment, the custody evaluator's opinion on respective parental stability, and J.L.'s preference to be with Mother. There is evidence from which the trial court could determine that there was a change in one or more of the relevant statutory factors and that modification of the Children's physical custody was in their best interests. The findings, conclusions, and order with regard to custody are not clearly erroneous.

Father also contends that evidence of “monetary factors” elicited at the outset of the custody modification hearing does not support the child support order. Appellant’s Brief at 17. The trial court imputed to Father a salary of \$1,201.92 weekly and ordered him to pay \$217.00 as weekly child support.

The Indiana Child Support Guidelines define “weekly gross income” as actual weekly gross income of the parent if employed to full capacity, potential income if unemployed or underemployed, and imputed income based upon “in-kind” benefits. Ind. Child Supp. G. 3(A). A court can consider many factors in determining whether someone is underemployed, including a conscious decision to reduce income to avoid a higher child support obligation. In re Marriage of Turner v. Turner, 785 N.E.2d 259, 265 (Ind. Ct. App. 2003). The Guidelines give the trial court wide discretion to impute potential income to a parent when the trial court is convinced the parent’s unemployment or underemployment has been contrived for the sole purpose of evading support obligations. Id. (citing Gilpin v. Gilpin, 664 N.E.2d 766, 768 (Ind. Ct. App. 1996)). However, the guidelines make it clear that to determine whether potential income should be imputed, the trial court should review the obligor’s work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community. Id.

Here, the trial court made the following finding of fact with respect to Father’s employment:

Mr. Lewis presents himself as a bright, well educated, well groomed, and articulate individual. He has what would seem to be a highly marketable degree in electrical engineering from Purdue University. For some inexplicable reason, he has been unemployed for twelve (12) months after

losing his sixty-two thousand five hundred dollar (\$62,500.00) per year job for absenteeism and tardiness. Mr. Lewis is voluntarily unemployed. His income is unemployment and food stamps.

(App. 2.)

The trial court properly found, based upon the evidence of record, that Father is unemployed and living on unemployment insurance and food stamps despite having an engineering degree. However, there was no evidence presented that Father's degree is "highly marketable" with regard to prevailing opportunities in the parties' geographic region.

Father testified as follows:

Mother's Attorney: Do you have, let's say a reason why has is [sic] it then [been] over a year since you've been employed?

Father: A good question, I can't tell you the thoughts of others so I don't know, I've made several attempts to even get basic, more basic jobs and was unable to.

(Tr. 13.) Father also explained that he had explored some potential job opportunities out-of-state. However, the tenor of the questions from Mother's attorney made it plain that Mother did not find potential out-of-state relocation to be in the Children's best interests.

Moreover, there is no evidence that Father's employment decisions were motivated by a desire to evade child support. Indeed, he had been unemployed for some time during which he had custody of the Children and neither parent was ordered to pay child support.

The trial court imputed income to Father based upon his credentials and past earnings without regard to current prevailing opportunities. As such, the trial court applied an incorrect legal standard to the properly found fact of unemployment. Because the trial court abused its discretion in imputing income to Father, we reverse the order on child support and

remand to the trial court with instructions to recalculate Father's gross income for child support purposes.

Affirmed in part, reversed in part, and remanded.

MATHIAS, J., and BARNES, J., concur.